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No. 09-1108

IN THE
Supreme Court of the United States

AIMEE ZMYSLY, AS REPRESENTATIVE AND GUARDIAN OF THE PERSON AND ESTATE OF YURIY ZMYSLY, A DISABLED ADULT,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF ALEXIS WITT AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

United States Air Force Staff Sergeant ("SSgt.") Dean Patrick Witt was one of the thousands of U.S. service men and women victimized by serious medical malpractice in U.S. military hospitals. The suffering of these military personnel, as well as of their spouses and children, has been compounded by the application of the so-called *Feres* doctrine — a judicial gloss on the Federal Tort Claims Act ("FTCA") created by this Court in *Feres v. United States*, 340 U.S. 135 (1950).

In October 2003, SSgt. Witt was a healthy 25 year old serving as a recruiter in the U.S. Air Force. He was married to Alexis Witt and had two young children. Pursuant to a permanent change of station order, SSgt. Witt was on temporary leave and in the process of moving his family from Hill Air Force Base in Utah to Travis Air Force Base in California. While Alexis Witt remained in Utah with their young children, SSgt. Witt moved his family's belongings into their new home. Alexis and SSgt. Witt planned to reunite the family as soon as SSgt. Witt got settled in California.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represent that (1) no counsel for a party authored this brief in whole or in part and (2) no person or entity other than the Supreme Court Clinic of the University of Texas Law School (which represents *amicus* on a pro bono basis) made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), counsel for *amicus* represent that all parties were provided notice of *amicus*'s intention to file this brief at least 10 days before its due date. Counsel for *amicus* also represent that all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

The family never reunited. On October 10, 2003, SSgt. Witt sought treatment for severe abdominal pain at David Grant Medical Center, the base hospital associated with Travis Air Force Base. He was diagnosed with acute appendicitis, and, twenty days before he was scheduled to report to his commanding officer at Travis Air Force Base, SSgt. Witt underwent what should have been a routine appendectomy at the base hospital. Although the appendectomy was, in fact, routine, his post-operative care was grossly negligent. As a result, SSgt. Witt suffered a catastrophic brain injury and lapsed into a coma. In less than three months, "[a] 25 year old man who devoted his life to serving his country" would die of his injuries "through no fault of his own." *Witt v. United States*, No. 2:08-CV-02024, 2009 U.S. Dist. LEXIS 9451, at *6 (E.D. Cal. Feb. 10, 2009), *appeal pending*, No. 09-15339 (9th Cir.).

The facts underlying the Witt family's tragedy are undisputed. Following an "uncomplicated" appendectomy performed by Lt. Col. (Dr.) Eric Ifune under general anesthesia with an endotracheal intubation (a breathing tube), SSgt. Witt was extubated[2] by a student registered nurse anesthesiologist and transported to the recovery room. The supervising certified registered nurse anesthetist, U.S. Air Force Major Rachael Delaporte, chose not to accompany her patient while he was being moved. Rather, she stayed behind to gather supplies used in the surgery and followed approximately 20 paces behind. While being transported, SSgt. Witt exhibited signs of post-operative respiratory distress — his breathing became

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[2] Extubation is a medical procedure in which the tube responsible for delivering oxygen to the patient's lungs during surgery is removed from his airway.

shallow and his skin took on a bluish hue. In response to his distress, the student anesthesiologist wheeled him into a nearby pediatric recovery area and attempted to open his airway to ventilate him. The student anesthesiologist was unsuccessful in her attempt to ventilate SSgt. Witt.

When Major Delaporte caught up with her patient, she also attempted to ventilate SSgt. Witt. This second attempt failed because she used pediatric equipment that lacked the air capacity needed to ventilate her adult patient. Major Delaporte then attempted a direct endotracheal intubation — a procedure that involves inserting a tube directly into a patient's trachea to facilitate mechanical ventilation. This attempt failed because she incorrectly inserted the intubation tube into SSgt. Witt's esophagus rather than his trachea, thus completely depriving him of oxygen. During these failed attempts to revive SSgt. Witt, Major Delaporte neglected to signal a "Code Blue," an act that would have called a resuscitation team to assist her in this emergency. Eventually, an M.D. anesthesiologist arrived and performed a second endotracheal intubation, which was successful. By then, SSgt. Witt had been deprived of oxygen for seven to ten minutes. He suffered a severe brain injury as a result and, without ever regaining consciousness, died of his injuries after a three-month coma.

The negligent care provided to SSgt. Witt is well-documented. An independent certified registered nurse anesthetist reviewed SSgt. Witt's medical records and cited nineteen separate breaches of the standard of care during his treatment. Upon investigation by the California Board of Nursing, Major Delaporte admitted that she was guilty of gross

negligence and/or incompetence. She surrendered her nurse anesthetist license to the Board.

After learning of the negligent care that caused the death of her husband, *amicus* Alexis Witt filed an administrative claim with the United States Air Force, in accordance with 28 U.S.C. §§ 2672 and 2675(a). The Air Force claims administrator offered Alexis Witt the service's "most profound sympathy for the unimaginably tragic loss of SSgt Witt," but, citing *Feres* and cases applying *Feres*, concluded that "the law allows me no other choice but to deny [the] claim." Letter from Hildegarde Conte Perlstein Denying Claim No. 05-687, at 1 (Mar. 7, 2008).

Mrs. Witt then brought suit under the FTCA, 28 U.S.C. §§ 1346, 2671 *et seq.*, naming the United States as the sole defendant. In this action, she alleged that negligent medical care provided by employees of the United States acting within the scope of their employment caused the injuries to and wrongful death of SSgt. Witt.

The United States District Court for the Eastern District of California felt "duty-bound" to dismiss Mrs. Witt's claim, basing its opinion solely on the application of the *Feres* doctrine. *Witt*, 2009 U.S. Dist. LEXIS 9451, at *6. Nonetheless, the district court struggled with a result that it said "can only be characterized as unfair and irrational." *Id.* at *7. As a result, the court "encourage[d] the Ninth Circuit to consider the Feres Doctrine en banc, especially in light of the inequitable result of its application in this case," and closed with a similar plea to this Court, asserting that "now is the time to revisit the *Feres* doctrine." *Id.* at *6–*7.

Alexis Witt's case is currently pending before the United States Court of Appeals for the Ninth Circuit,

with oral argument scheduled for May 11, 2010. If this Court grants the pending petition of Yuriy Zmysly and decides to revisit its questionable interpretation of the FTCA in *Feres*, the Ninth Circuit would likely remand Alexis Witt's case for further proceedings in the district court. If the Court denies Zmysly's petition and the Ninth Circuit concludes that the *Feres* doctrine bars Alexis Witt's claim, she intends to seek review in this Court, and this Court will hear Alexis Witt's plea as a petitioner rather than an *amicus*.

ARGUMENT

Amicus Alexis Witt joins the ever-increasing chorus of victims, victims' families, scholars, lawyers, and judges who urge this Court to reconsider the Court's unsustainable interpretation of the FTCA to bar active-duty service members' recovery for injuries caused by negligent medical care provided by hospitals operated by the United States Armed Services.

I. *FERES* WAS WRONGLY DECIDED

"*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *United States v. Johnson*, 481 U.S. 681, 700 (1987) (Scalia, J., dissenting) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 1242, 1246 (E.D.N.Y.), *appeal dismissed*, 745 F.2d 161 (2d Cir. 1984)). In *Feres*, this Court created an exception to governmental liability under the FTCA ungrounded in either text or legislative history. The Court has since largely abandoned the reasons asserted in *Feres* as justifications for this extension. And additional justifications proffered since *Feres* do not withstand close scrutiny. The resulting doctrine, untethered to the statutory text and unsupported by

coherent policy goals, has sown confusion among the lower federal courts and inequities among claimants. *Feres* should be overruled.

A. The *Feres* Doctrine Finds No Support In The Text Of The FTCA

The notion that Congress intended to exclude intramilitary suits from the jurisdiction of the United States district courts finds no support in the plain text of the FTCA. The FTCA waives traditional sovereign immunity for the tortious conduct of government employees. In particular, the FTCA renders the government liable

> [f]or money damages . . . for injury or loss of property, personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 1346(b)(1).

This provision renders the United States liable to all persons, including service men and women, injured by the negligence of government employees. *See Johnson*, 481 U.S. at 693 (Scalia, J., dissenting). While other provisions of the Act set forth thirteen highly detailed exceptions to this broad waiver of immunity, none evinces an intent generally to preclude suits brought by members of the Armed Services. In fact, in the only provision aimed directly at suits implicating the military, Congress expressly excluded from the reach of the FTCA

> [a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, *during time of war.*

28 U.S.C. § 2680(j) (emphasis added).

Notwithstanding the lack of textual justification for exempting all suits brought by military personnel, *see Brooks v. United States*, 337 U.S. 49, 51 (1949), this Court in *Feres* created a sweeping exception to the FTCA for "injuries to servicemen [that] arise out of or are in the course of activity incident to service." 340 U.S. at 146. This exception has come to be known as the *Feres* doctrine.

The *Feres* doctrine is untenable as an exercise in statutory interpretation. As Justice Scalia's dissent in *Johnson* makes clear, the text of the statute indicates that Congress likely intended the FTCA to confer federal jurisdiction over claims by active duty military personnel. *See* 481 U.S. at 693 (Scalia, J., dissenting) (inferring from FTCA's sweeping language of liability and limited language excluding damages arising out of combatant activities that it "renders the United States liable to *all* persons, including servicemen"). Indeed, in this Court's first encounter with an FTCA suit brought by a service member, it gave effect to the plain reading of the statute and permitted a negligence action brought by military personnel injured in a collision with an Army truck while off duty. *See Brooks*, 337 U.S. at 51 ("We are not persuaded that 'any claim' means 'any claim but that of servicemen.'").

Moreover, as Justice Scalia also noted in his *Johnson* dissent, the fact that Congress specifically considered and provided for the special requirements of the military during combat indicates that it did not intend a broad, incident-to-service bar. *See* 481 U.S.

at 693 (Scalia, J., dissenting). As the Court reasoned in *Brooks*, the express exception contained in the FTCA is "too lengthy, specific, and close to the present problem . . . [that] [i]t would be absurd to believe that Congress did not have the servicemen in mind in 1946, when this statute was passed." 337 U.S. at 51. Thus, there remains "no proper basis for [this Court] to supplement . . . congressional disposition" with non-textual exceptions to the FTCA. *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting).

B. No Sound Policy Justifies The *Feres* Doctrine's Prohibition On Suits By Members Of The Armed Services

In support of its judicially crafted incident-to-service bar, the *Feres* Court offered several policy rationales. *See* 340 U.S. at 142–45. In subsequent cases, new justifications were added to the list while others appeared to drop off. *See, e.g., Johnson*, 481 U.S. at 690–91 (invoking new justifications); *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985) ("Although no longer controlling, other factors mentioned in *Feres* are present here."); *Lombard v. United States*, 690 F.2d 215, 229 n.7 (D.C. Cir. 1982) (Ginsburg, J., concurring in part and dissenting in part) ("[T]he Court occasionally seemed to retreat from certain aspects of the reasoning underlying the doctrine."). As Justice Scalia has noted, "none of these rationales justifies the result." *Johnson*, 481 U.S. at 694 (Scalia, J., dissenting). The *Feres* doctrine remains a judicial embellishment of an unambiguous statute that lacks any coherent policy rationale.

II. *FERES* LEADS TO UNJUST AND IRRATIONAL OUTCOMES

The FTCA permits recovery against the government by civilians, veterans, and military dependents when, in identical situations, the *Feres* doctrine prevents recovery by military service members. This absolute bar to recovery for members of the Armed Service for any tort suffered "incident to service" imposes a gross injustice on our military personnel. *See United States v. Brown*, 348 U.S. 110, 114 (1954) (Black, J., dissenting) ("To permit a veteran to recover damages from the Government in circumstances under which a soldier on active duty cannot recover seems like an unjustifiable discrimination which the Act does not require.").

Compounding this injustice are the unpredictable and seemingly arbitrary outcomes of cases in which *Feres* is implicated. The examples are legion. In *Kelly v. Panama Canal Commission*, 26 F.3d 597, 599–600 (5th Cir. 1994), the Fifth Circuit permitted a service member to recover damages from an accident that occurred in a boat rented from an on-base marina, because he was off-duty and off-base when injured. But in *Costo v. United States*, 248 F.3d 863, 869 (9th Cir. 2001), the Ninth Circuit applied *Feres* to bar a suit brought on behalf of a sailor who was injured during a "recreational rafting trip" led by a civilian in which she participated while "off duty and on liberty."

The inequities are expanded when the *Feres* doctrine intersects with the increasing role of women in the service and the reality that pregnant service women seek prenatal care in military facilities. Although the *Feres* doctrine does not bar suits by spouses and dependents of service members, courts

have arrived at conflicting results when claims are brought on behalf of dependents injured by negligent prenatal care. The Fifth Circuit has held that, when the *Feres* doctrine normally would bar recovery by the mother for negligent medical care, it also bars recovery by the mother's child for prenatal injuries caused by that negligent care. *See Scales v. United States*, 685 F.2d 970, 973–74 (5th Cir. 1982). The Sixth Circuit, in contrast, permitted a child to recover for injuries caused by negligent prenatal care, because the particular care at issue was not directed at the mother, but only at the unborn baby. *See Brown v. United States*, 462 F.3d 609, 615–16 (6th Cir. 2006).

The Eleventh Circuit applied the *Feres* doctrine to a tragic case in which negligent prenatal care led to the premature birth of twin boys. *See Del Rio v. United States*, 833 F.2d 282, 284 (11th Cir. 1987). One of the boys was severely injured but survived, while his twin died five days after he was born. The court held that *Feres* barred the boys' mother from recovering for her injuries when she received negligent prenatal care at a military hospital. *Id.* at 286. The court further held that the mother was precluded from recovering for the wrongful death of her deceased child, because she (as personal representative) would receive the benefits of any recovery. *Id.* at 288. But the court concluded that none of the rationales underlying the *Feres* doctrine would be implicated by a suit on behalf of the surviving twin, so the court permitted that suit to go forward. *Id.*

The difference between being *Feres*-barred and having access to recovery is sometimes the difference between a long weekend and a normal commute. *Compare Parker v. United States*, 611 F.2d 1007,

1015 (5th Cir. 1980) (holding that service member's family could recover for his death, which occurred while he was leaving the base for a four-day weekend), *with Richards v. United States*, 176 F.3d 652, 656 (3d Cir. 1999) (barring recovery when service member was killed while leaving the base for the day). The distinctions separating these cases often are extremely narrow, "fine distinctions that are often determinative" of whether an injured service member has a right to recover. *Dreier v. United States*, 106 F.3d 844, 852 (9th Cir. 1996). The dissent in *Johnson* provided a hypothetical that illustrated "inconsistencies . . . attributable to *Feres*" and the disharmony in the law created by "ignoring what Congress wrote and imagining what it should have written." 481 U.S. at 702 (Scalia, J., dissenting). Coupled with these few examples of *Feres*'s inequities, the confusion and unjustness of *Feres* are readily apparent.

As some of the circuits have admitted, there is no principled way to draw distinctions in *Feres* doctrine cases beyond attempting to compare the facts of particular cases to see if, in those cases, recovery was allowed. *See, e.g.*, *Costo*, 248 F.3d at 867 ("[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, 'comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine' is the most appropriate way to resolve *Feres* doctrine cases.") (quoting *Dreier*, 106 F.3d at 848). In practice, this means that the lower courts, depending on the level of generality they choose to apply, have wide discretion to permit or prohibit a service member's suit.

Feres has thus become a legal doctrine unconnected with statutory text, detached from its underlying

rationale, and implemented by the lower courts in uncertain and inequitable ways.

III. THE TIME IS RIPE FOR THIS COURT TO REVIEW THE *FERES* DOCTRINE

The time is ripe to review the *Feres* doctrine. At the very least, this Court should reconsider whether the doctrine should apply to bar claims by service members injured by the military's medical malpractice.

A. More Than Twenty Years Have Passed Since This Court's Last Review Of *Feres*

This Court last reviewed the *Feres* doctrine's scope twenty-three years ago. In *Johnson*, a helicopter pilot for the United States Coast Guard died while performing a rescue operation in accordance with his official duties. *Id.* at 682–83. Those facts, this Court held, fell "within the heart" of the *Feres* doctrine's bar to military service members from suing the United States for injuries that "'arise out of or are in the course of activity incident to service.'" *Id.* at 692, 686 (quoting *Feres*, 340 U.S. at 146). Examining those facts, which fell squarely within the traditional interpretation of the *Feres* doctrine, the four *Johnson* dissenters questioned whether the rationales underlying *Feres* could "justif[y] the result" in *Feres* itself. *Id.* at 694 (Scalia, J., dissenting).

The strong dissent in *Johnson* demonstrates that questions arose about the broad application of the judicially created *Feres* doctrine in the years between *Feres* and *Johnson*. This Court has left those questions unanswered in the intervening decades, during which lower courts have struggled to apply a doctrine that even members of this Court admit is no longer supported by its stated rationales.

B. *Johnson*'s Re-Affirmation Of *Feres* Did Not End Criticism Of The Doctrine

Even after this Court's last affirmation of the *Feres* doctrine in *Johnson*, members of this Court and lower courts have criticized the *Feres* doctrine's broad application. *See, e.g., United States v. Stanley*, 483 U.S. 669, 705 (1987) (Brennan & Stevens, JJ., concurring in part, dissenting in part) (criticizing the Court's application of the *Feres* doctrine).

In *amicus* Alexis Witt's case just last year, the district court "reluctantly" granted the government's *Feres* motion to dismiss the case, but not without criticizing the doctrine. *Witt*, 2009 U.S. Dist. LEXIS 9451, at *6–*7. Indeed, the court declared that "[t]he alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that [it] should allow this claim in spite of *Feres*." *Id.* at *5–*6. *See also, e.g., Tootle v. USDB Commandant*, 390 F.3d 1280, 1283 (10th Cir. 2004) ("Notwithstanding potential equal protection concerns about the *Feres* doctrine, . . . this panel is bound to follow the decisions of the Supreme Court and the published decisions of this court."); *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999) ("A few of *Feres*'s original reasons no longer seem so persuasive, and intrusions by courts to grant equitable relief in military matters have become more familiar in recent years.") (citation omitted).

C. If This Court Postpones Its Review Of The *Feres* Doctrine, Service Members Will Continue To Be Denied Access To Remedies For Their Injuries

As is inevitably true, the reported decisions represent only the tip of the iceberg. Each year many

hundreds of military personnel are injured through medical malpractice in the nation's military hospitals. Hundreds (if not thousands) more are injured as a result of other forms of negligence by the government and its employees. While similarly situated civilian employees — and even the dependents of military personnel — can seek just compensation for their injuries under the FTCA, thousands of young men and women "who [have] devoted [their] li[ves] to serving [their] country," *Witt*, 2009 U.S. Dist. LEXIS 9451, at *6, are denied the remedy that Congress intended them to have. Every year that this Court waits to correct the error made in *Feres* simply compounds the injustice and deprives thousands more of their rights.

IV. COURTS AND SCHOLARS HAVE OVERWHELMINGLY CALLED FOR *FERES* TO BE OVERTURNED

A. Members Of This Court And Several Lower Courts Have Roundly Criticized *Feres*

The list of voices calling for this Court to revisit *Feres* is long and distinguished. Justice Scalia, joined by Justice Stevens and two other members of the Court, has characterized the "'widespread, almost universal criticism' [*Feres*] has received" as "heartily deserve[d]." *Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). In that dissent, Justice Scalia included a lengthy footnote listing critics of the doctrine. *See id.* at 701 n.*.

Justice Ginsburg, while serving as a circuit judge, was constrained to follow the *Feres* doctrine but described it as "problematic" and dissented from a panel decision extending its application. *See Lombard*, 690 F.2d at 233 (Ginsburg, J., concurring in part and dissenting in part); *see also id.* at 229 nn.6-7 (describ-

ing problems with the *Feres* Court's analysis and observing that "the soundness of the *Feres* Court's interpretation of the FTCA continues to be questioned").

Since Justice Scalia compiled his collection of criticism, the "widespread, almost universal criticism" of *Feres* has become even more pronounced. It has become commonplace for judges whose hands are tied by *Feres* openly to criticize or even apologize for the unjust results that they are bound to reach. *See, e.g.*, *Richards*, 176 F.3d at 657 ("Thus, we are left with a counter-intuitive and inequitable result simply because of Private Richards's military status. It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *Bowers v. United States*, 904 F.2d 450, 452 (8th Cir. 1990) ("We reach this result with a pronounced lack of enthusiasm."); *Loughney v. United States*, 839 F.2d 186, 187 & n.2 (3d Cir. 1988) ("We are sympathetic to [plaintiff's] legal arguments, and we are distressed by the tragic circumstances that gave rise to her suit."; "This Court has previously expressed its dissatisfaction with applying the *Feres* doctrine to cases of medical malpractice."); *Witt*, 2009 U.S. Dist. LEXIS 9451, at *5–*6 ("The alleged facts in the instant case are so egregious and the liability of the Defendant seems so clear that this Court did give serious consideration to Plaintiff's argument that [it] should allow this claim in spite of *Feres*. . . . [*Feres*'s] application to this case seems particularly unfair. However, as wrong-headed as it may seem, this Court is duty-bound to follow precedent and abide by the decisions of the Ninth Circuit and Supreme Court.").

While the tragic facts of a particular case may serve to compound the perceived injustice worked by the application of the *Feres* bar, the judicial criti-

cisms lodged against *Feres* often transcend the facts of individual cases, aiming instead at the shaky legal foundation upon which the decision rests. Courts have questioned the *Feres* decision's substantial departure from the text of the FTCA,[3] noted the unpersuasive nature of the original reasoning underlying the *Feres* decision,[4] and criticized the confusion wrought by *Feres* and its progeny.[5]

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[3] *See Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J., concurring) ("A long line of Supreme Court cases, beginning with *Feres v. United States*, have been decided in seeming opposition to Congress' clearly expressed intent in the FTCA as to the scope of intra-military immunity."); *Richards v. United States*, 180 F.3d 564, 564 (3d Cir. 1999) (Rendell, J., dissenting from denial of a petition for rehearing en banc) ("This case presents yet another compelling argument for the abandonment of the *Feres* doctrine. *Feres* represents more than a 'bad estimation[]' of what Congress intended to do (but did not do), in the [FTCA]."); *Lombard*, 690 F.2d at 229 n.6 (Ginsburg, J., concurring in part and dissenting in part) ("No explicit provision in the [FTCA] required the *Feres* holding. The FTCA contains several specific exceptions, including one for '[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.' The incidents at issue in *Feres* occurred in peacetime and did not involve 'combatant activities.'") (citations omitted).

[4] *See, e.g.*, *Day*, 167 F.3d at 683 ("A few of *Feres*'s original reasons no longer seem so persuasive, and intrusions by courts to grant equitable relief in military matters have become more familiar in recent years.") (citation omitted); *Backman v. United States*, No. 97-2271, 1998 WL 421955, at *3 (10th Cir. July 23, 1998) (judgment noted at 153 F.3d 726) (Henry, J., concurring) ("I write separately in order to note that the somewhat dubious foundation of *Feres* seems to be weakening."); *Estate of McAllister v. United States*, 942 F.2d 1473, 1476 (9th Cir. 1991) ("A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrine's purported rationales.");

And the outcry against *Feres* does not end there. Lower courts have also cited practical considerations unforeseen to the court in 1950, such as the increasing role of the military in non-combat functions, as a reason the decision should be reconsidered or clarified. *See, e.g., Overton v. New York State Div. of Military & Naval Affairs*, 373 F.3d 83, 100 (2d Cir. 2004) (Pooler, J., concurring in the judgment) (citing Jonathan Turley, *Pax Militaris: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1, 34-35 (2003); *Lutz v. Secretary of the Air Force*, 944 F.2d 1477, 1487 (9th Cir. 1991)).

B. Lower Courts Have Called On This Court To Reconsider *Feres*

In light of the widespread criticism, it is not surprising that many lower courts have explicitly called upon this Court to reexamine its decision in *Feres*. In *amicus* Alexis Witt's case, the district court that "reluctantly" granted the government's motion to dismiss the case also "join[ed] in [an earlier] plea to the Supreme Court . . . that now is the time to revisit the *Feres* doctrine. Otherwise, *Feres* will once again

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Bozeman v. United States, 780 F.2d 198, 200 (2d Cir. 1985) ("The original rationales for the holding in *Feres* have been undercut."); *Monaco v. United States*, 661 F.2d 129, 131-32, 134 & n.3 (9th Cir. 1981) ("The *Feres* doctrine today stands on shaky ground with its precise justification somewhat confused.").

[5] *See, e.g., Schoenfeld v. Quamme*, 492 F.3d 1016, 1019 (9th Cir. 2007) (describing the circuit's *Feres* jurisprudence as "something of a muddle"); *Costo*, 248 F.3d at 867 ("[T]he cases applying the *Feres* doctrine are irreconcilable."); *Taber v. Maine*, 67 F.3d 1029, 1032 (2d Cir. 1995) ("[W]e would be less than candid if we did not admit that the *Feres* doctrine has gone off in so many different directions that it is difficult to know precisely what the doctrine means today.").

have led to a result that can only be characterized as unfair and irrational." *Witt*, 2009 U.S. Dist. LEXIS 9451, at *7. *See also, e.g.*, *Richards*, 180 F.3d at 565 (Rendell, J., dissenting from denial of a petition for rehearing en banc) ("I urge the Supreme Court to grant certiorari and revisit what we have wrought during the nearly fifty years since the Court's pronouncement in *Feres*."); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, J., dissenting from denial of a petition for rehearing en banc) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."); *cf. Day*, 167 F.3d at 683 ("Possibly *Feres* itself deserves reexamination by the Supreme Court. . . . [T]he Supreme Court has increasingly reminded the lower federal courts that departures from prior Supreme Court precedent should not normally be pioneered by circuit or district judges.").

C. Respected Commentators Have Denounced *Feres*

The American Bar Association ("ABA") has taken the official position that the *Feres* doctrine is "unnecessary, unwarranted, and patently unfair and unjust." ABA House of Delegates Resolution 10B, at 14 (2008) ("ABA Resolution 10B"), *available at* http://www.abanet.org/leadership/2008/annual/recommendations/TenB.doc. The ABA has solidified its opposition to *Feres* in two separate resolutions. The first resolution, passed in 1987, opposed the application of *Feres* to malpractice cases, *see id.* at 15, where the military discipline rationale is weakest. In 2008, the ABA expanded its criticism beyond the context of medical malpractice to the *Feres* doctrine as a

whole.[6] *See* ABA Legislative Issues List at 95, *available at* http://www.abanet.org/poladv/documents/legiss.pdf; ABA Resolution 10B, at 1.

The Commission on the Fiftieth Anniversary of the Uniform Code of Military Justice also called for a reconsideration of the *Feres* doctrine. *See* HONORABLE WALTER T. COX III, ET AL., REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE § IV.C (May 2001), *available at* http://www.wcl.american.edu/nimj/cox_commission.cfm. Although the *Feres* doctrine was beyond the scope of the original agenda, the Commission nevertheless suggested reconsideration because so many of the claims barred by the *Feres* doctrine "bear little if any relation to the performance of military duties or obedience to orders on their merits." *Id.*

Legal scholars have also published a steady stream of articles criticizing *Feres* over the past few decades.[7] Most notable among these are two such articles that were written by serving military officers. *See* Dana Michael Hollywood, *Creating a True Army of One: Four Proposals to Combat Sexual Harassment*

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[6] These ABA Resolutions urged legislative action to overturn *Feres*, but the rationale behind them and the reasons motivating their passage apply with equal force to this Court's reconsideration of the *Feres* doctrine.

[7] *See, e.g.*, Turley, 71 GEO. WASH. L. REV. at 2 ("Both academics and lower courts have condemned the doctrine as unfounded, unfair, and even un-American."); Note, *From* Feres *to* Stencel: *Should Military Personnel Have Access to FTCA Recovery?*, 77 MICH. L. REV. 1099, 1101, 1121–25 (1977) (arguing that the textual exceptions to governmental liability set out in the FTCA, "particularly the exception for 'discretionary actions' by government employees, would adequately protect all legitimate military interests").

in Today's Army, 30 HARV. J.L. & GENDER 151, 185–92 (2007); Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 MILITARY L. REV. 1 (2007).

Major Brou, then a Judge Advocate in the U.S. Army, offers a number of solid criticisms of *Feres*. Among them, Brou argues that *Feres* prevents the government from reaping the prophylactic results that tort liability might otherwise provide,[8] interferes with separation of powers,[9] and is in fact not supported by the rationales put forth by the *Feres* Court.[10] With respect to military discipline, Brou argues that "[a]llowing service members to sue under the [FTCA] for injuries or death due to a military doctor's medical malpractice does not harm military discipline or decision making . . . because military physicians rarely, if ever, serve as commanders or leaders." 192 MILITARY L. REV. at 56. In the broader context (beyond medical malpractice), Brou argues

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[8] "Because [FTCA] suits can focus judicial and public attention on an organization's shortcomings, government organizations facing suit for negligence under the [FTCA] may be more inclined to take measures to prevent recurrences of such negligence. This could improve the efficient and safe operation of the agency. However, the *Feres* doctrine destroys this incentive to prevent future acts of negligence by allowing the Government to evade liability for injuries a negligent government employee inflicts upon a service member." Brou, 192 MILITARY L. REV. at 33.

[9] "In creating the incident to service test, the Supreme Court ignored the plain meaning of the [FTCA] and created an additional exception to the Act. Apart from its anomalous line of *Feres* doctrine cases, the Court has found that the Act broadly waives sovereign immunity, and has repeatedly rejected judicial expansions of the Act's exceptions." *Id.* at 35–36.

[10] *See id.* at 40–59.

that, "[e]ven though the *Feres* doctrine protects [military discipline], it is too broad. Applying the [FTCA's] plain language and enumerated exceptions, such as the discretionary function exception, can preserve the military's decision and policy-making authority while affording service members rights commensurate with those of civilians under the [FTCA]." *Id.* at 59.

Hollywood, also a Judge Advocate General in the U.S. Army at the time her article was published, agrees with Brou that "the military discipline rationale on which [*Feres*] rests today cannot logically be sustained. On the most basic level, 'if servicemembers believe that the military treats its personnel fairly, they may be more likely to accept and meet the demands of their jobs.'" 30 HARV. J.L. & GENDER at 191 (quoting Robin Rogers, Comment, *A Proposal for Combatting Sexual Discrimination in the Military: Amendment of Title VII*, 78 CAL. L. REV. 165, 192 (2000)).[11]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] Although Hollywood advocates for the overturning of *Feres* so that "female soldiers who have been the victims of sexual harassment must be given the same rights for redress as their civilian counterparts," Hollywood, 30 HARV. J.L. & GENDER at 186, her examination of *Feres* goes well beyond this context.

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